AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, January 27, 2017, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of November 18, 2016 minutes [Page 1 to 4]

III. Announcements from the Chair

A. Informational item: In re the Marriage of Gromicko, 2017 CO 1 [Page 5 to 21]

B. CRCP 120—Remand from the Supreme Court for further consideration [Page 22 to 31]

IV. Business

A. CRCP 16.1—(Judge Davidson and Richard Holme)

B. New Form for admission of business records under hearsay exception rule—(Damon Davis and David Little) [Page 32 to 38]

C. CRCP 57(j) & Fed. R. Civ. P. 5.1—(Stephanie Scoville)

D. CRCP 83—(Jeannette Kornreich)

E. CRCP 121 §1-15—Confession of motions (Judge Jones) [Page 39 to 44]

F. *Warne v. Hall* Subcommittee—(Brad Levin)

G. Rule 365—(Ben Vinci) [Page 45 to 50]

V. New Business

VI. Adjourn—Next meeting is March 31, 2017 at 1:30pm

Michael H. Berger, Chair
michael.berger@judicial.state.co.us
720 625-5231

Jenny Moore
Rules Attorney
Colorado Supreme Court
jenny.moore@judicial.state.co.us
720-625-5105

Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 32231344, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
November 18, 2016 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 p.m., in the Court of Appeals Full Court Conference Room on the third floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	**Present**	**Excused**
Judge Michael Berger, Chair	X	
Chief Judge (Ret.) Janice Davidson	X	
Damon Davis	X	
David R. DeMuro	X	
Judge J. Eric Elliff	X	
Judge Adam Espinosa	X	
Judge Ann Frick		X
Judge Fred Gannett		X
Peter Goldstein	X	
Lisa Hamilton-Fieldman	X	
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Debra Knapp	X	
Cheryl Layne		X
Judge Cathy Lemon		X
Bradley A. Levin	X	
David C. Little	X	
Chief Judge Alan Loeb		X
Professor Christopher B. Mueller	X	
Gordon “Skip” Netzorg		X
Brent Owen	X	
Judge Sabino Romano	X	
Stephanie Scoville	X	
Lee N. Sternal	X	
Magistrate Marianne Tims	X	
Jose L. Vasquez	X	
Ben Vinci		X
Judge John R. Webb	X	
J. Gregory Whitehair	X	
Judge Christopher Zenisek	X	
Non-voting Participants		
Justice Allison Eid, Liaison		X
Jeannette Kornreich	X	

I. Attachments & Handouts

A. November 18, 2016 agenda packet
B. Supplemental Material
   1. C.R.C.P. 16.1 proposal
   2. Comment to C.R.C.P. 16.1 proposal

II. Announcements from the Chair

- The October 28, 2016 minutes were approved as submitted;
- Former chair and longtime member Richard Laugesen has resigned from the committee. Judge Berger recognized and thanked Mr. Laugesen for his dedication and contribution to the committee;
- The C.R.C.P. 120 hearing was held on November 20 at 2:30. There were six speakers, and only one spoke against the proposal. Judge Berger will update the committee on the status of the proposal; and
- The proposed addition of section 1-27 to Rule 121 has been withdrawn. The drafters are revising the proposal to try to garner more support.

III. Business

A. C.R.C.P. 16.1

Judge Davidson and Richard Holme began and stated that a revised version of the rule had been circulated to the committee. Major changes in the revised version include the deletion of limitations on damages (former subsection (c)); the change from 35 to 42 days in subsection (d); and, the last sentence in subsection (l).

There was much discussion, and the following amendments were adopted or failed as noted:

- Add an opt out provision that allows a qualifying case to not proceed under the rule if all parties and clients stipulate; this motion failed with five yes votes;

- Add a provision allowing parties to submit five interrogatories; this motion failed 13:9;

- Amend subsections (b)(2) and (d)(i) by adding "or more" as follows

  Subsection (b)(2): "In compliance with C.R.C.P. 11, based on upon information reasonably available to me at this time, I certify and believe that ~~at least one of~~ my claims in this case against one or more of the other parties ~~in this case~~ have a fair expectation of being in excess of $100,000."

  Subsection (d)(i): "Good cause shall be established and a motion shall be granted if a defending party files a statement on by the its attorney or, if unrepresented, by the party, that "In compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify and believe that claims in this

case against one or more of the parties have a fair expectation of being in excess of $100,000," or"

This motion failed 12:7;

- There was a motion to add language clarifying that examination time would not be included in the six hours allotted for depositions. The committee was generally in favor of this but was unsure if language should be added to the rule or a comment. The subcommittee offered to draft language for the committee to consider, so the motion was withdrawn;

- There was a motion to add language clarifying that the six hours of deposition time allowed under the rule would exclude presentation depositions. The committee was generally in favor of this, and the subcommittee said it would consider it, so the motion was withdrawn;

- There was a motion to adopt the rule in concept, subject to additional review, and amendment at the January meeting. The motion passed 17:6.

Finally, Judge Berger asked the subcommittee to consider whether a comment should be added to the rule.

B. New form for admission of business records under hearsay exception rule
Tabled until the January 27, 2017 meeting.

C. C.R.C.P. 57(j)
Tabled until the January 27, 2017 meeting.

D. County and municipal appeals to district court
Judge Espinosa began and stated that the subcommittee had decided that the civil and criminal county and municipal appeal rules will not be harmonized. Each rule type contains different timelines for different reasons, so conforming amendments will not be pursued. However, the subcommittee is interested in working on a mechanism to allow indigent parties to receive transcripts. A couple of possible solutions were discussed:

- Audio recordings could be supplied to indigent parties, but trial courts would have to listen to the recordings, which could take a lot of time. While time logs are kept stating which witness is testifying, there wouldn't be pin cites, so time stamp information would not be available.

- A fund could be set-up to provide transcripts to indigent parties. If $1 was added to every civil filing, it would likely cover indigent transcripts. While setting up a fund is outside the committee's authority, it was an option discussed by the subcommittee. Judge Romano offered to find out how indigent parties receive transcripts in Adams County.

There was a motion to table this item until there was more information for the committee to consider; the motion was adopted unanimously.

E. C.R.C.P. 83

Jeannette Kornreich began and stated she'd like other members of the committee to join her and Judge Kuenhold on the subcommittee, so David DeMuro and Lisa Hamilton-Fieldman volunteered to serve. There was a question about whether the committee had authority to adopt a rule allowing for use of a sworn declaration in place of a notary, because while there is a federal statute allowing it, 28 U.S.C. 1746, there is not a similar state statute. The subcommittee will study the issue and make a recommendation at a future meeting.

F. C.R.C.P. 121 §1-15

Judge Berger stated that C.R.C.P. 121 §1-15 was inaccurate and needed to be reviewed. He received an email, contained in the agenda packet, asking a question regarding Rule Change 2016(01), which, in part, amended C.R.C.P. 121 §1-15. Also, it was acknowledged that the rule has been modified by a court of appeals opinion. A subcommittee will be formed, and Judge Jones volunteered to serve as chair.

G. JDF 1111

Ms. Kornreich began and stated that the amendment was brought to her attention by Court Services. The language above the certificate of service is inaccurate, and the placement confuses self-represented parties. After discussion, the committee voted unanimously to adopt the amended language.

Future Meeting
January 27, 2017

The Committee adjourned at 4:00 p.m.

Respectfully submitted,
Jenny A. Moore

ADVANCE SHEET HEADNOTE
January 9, 2017

2017 CO 1

No. 16SA199, In re Marriage of Gromicko—Pleading Requirements—C.R.C.P. 16.2—Alter Ego.

In this original proceeding, the supreme court considers whether the district court erred in ordering petitioner to produce a wide range of business records that may relate to a pending dissolution of marriage proceeding between respondent Wife and Husband. In the underlying dissolution proceeding, the district court granted broad discovery from petitioner, Husband's employer, based in large part on Wife's allegation that petitioner might be Husband's alter ego and thus might constitute marital property subject to equitable division. Petitioner sought review of the district court's order pursuant to C.A.R. 21, and the supreme court issued a rule to show cause why the district court's discovery orders should not be vacated. The supreme court now makes the rule absolute.

As an initial matter, the court rejects petitioner's argument that Wife was required to plead a veil-piercing claim in her petition for dissolution of marriage. The court further concludes, however, that the district court did not take the requisite active role in managing discovery in response to petitioner's scope objections. Specifically,

although petitioner timely objected to the scope of discovery sought from it, the district court made no findings about the appropriate scope of discovery in light of the reasonable needs of the case, nor did it tailor the discovery to those needs.

Accordingly, the supreme court vacates the portion of the district court's order compelling production of petitioner's business records on an alter ego theory and remands this case to that court for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2017 CO 1

Supreme Court Case No. 16SA199
Original Proceeding Pursuant to C.A.R. 21
Boulder County District Court Case No. 15DR30326
Honorable Bruce Langer, Judge

In re the Marriage of

Petitioner:

Lisa Dawn Gromicko,

and

Respondent:

Nickifor Nicholas Gromicko.

Rule Made Absolute
en banc
January 9, 2017

Attorneys for Petitioner International Association of Certified Home Inspectors:
Inman Flynn Biesterfeld & Brentlinger, P.C.
Frank Lopez
Denver, Colorado

Attorneys for Respondent Lisa Dawn Gromicko:
Michael E. Miner
Boulder, Colorado

Gill & Ledbetter, LLP
Anne Whalen Gill
Castle Rock, Colorado

No appearance by or on behalf of Nickifor Nicholas Gromicko.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this original proceeding, we consider whether the Boulder County District Court erred in ordering petitioner International Association of Certified Home Inspectors ("InterNACHI") to produce a wide range of business records that may relate to a pending dissolution of marriage proceeding between respondent Lisa Dawn Gromicko ("Wife") and Nickifor Nicholas Gromicko ("Husband"). In the underlying dissolution proceeding, the district court granted broad discovery from Husband's employer, non-party InterNACHI, based in large part on Wife's allegation that InterNACHI might be Husband's alter ego and thus might constitute marital property subject to equitable division. InterNACHI petitioned this court for review pursuant to C.A.R. 21, and we issued a rule to show cause why the district court's discovery orders should not be vacated. We now make the rule absolute.

¶2 As an initial matter, we reject InterNACHI's argument that Wife was required to plead a veil-piercing claim in her petition for dissolution of marriage. We perceive no such requirement in the applicable statutes, and we may not add one.

¶3 We further conclude, however, that when InterNACHI objected to the scope of Wife's subpoena, the district court did not take the active role in managing discovery that DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187, requires. Specifically, although InterNACHI timely objected to the scope of discovery sought from it, the district court made no findings about the appropriate scope of discovery in light of the reasonable needs of the case, nor did it make any attempt to tailor discovery to those needs. Instead, the court granted Wife the broad range of

discovery to which she might be entitled had she actually proved that InterNACHI was, in fact, Husband's alter ego, a fact that Wife had then (and has to date) merely alleged.

¶4 Because we conclude that the district court abused its discretion in so ruling, we vacate the portion of the court's order compelling production of InterNACHI's business records on an alter ego theory, and we remand this case with instructions that the court reconsider InterNACHI's motion to quash pursuant to the standards set forth in this opinion.

I. Facts and Procedural History

¶5 In September 2015, Wife filed a petition for dissolution of marriage. The petition named Husband as the respondent and requested, as pertinent here, spousal maintenance and an equitable division of the marital assets and debts.

¶6 In order to evaluate Husband's income and assets, Wife sought information from Husband's employer, InterNACHI. Founded by Husband in 2004, InterNACHI is a Colorado nonprofit corporation with tax-exempt status as a trade association under section 501(c)(6) of the Internal Revenue Code. Husband serves on InterNACHI's four-member board of directors, and Wife alleges that Husband is currently employed as InterNACHI's Chief Operating Officer.

¶7 Although Husband initially indicated that he would not object to InterNACHI's making certain records available to Wife, he subsequently refused to produce them, contending that he was merely an employee of InterNACHI and had no authority to provide its records. As a result of Husband's apparent change of position, Wife requested a status conference to address the outstanding discovery issues.

¶8 The court set a status conference, and the day before the conference, Husband's counsel, who also served as InterNACHI's general counsel, filed a brief on behalf of InterNACHI regarding access to that entity's records. In this brief, counsel argued that (1) the only InterNACHI records relevant to the dissolution proceeding were those reflecting Husband's compensation and expense reimbursements; (2) the court could not consider InterNACHI as a marital asset because Wife had not alleged in her dissolution petition grounds to pierce InterNACHI's corporate veil; and (3) if InterNACHI would not voluntarily produce the pertinent documents, then the court should authorize Wife to serve a subpoena duces tecum on InterNACHI for those records.

¶9 The status conference proceeded as scheduled, but the district court declined to rule on the foregoing discovery issues. The court, however, continued the permanent orders hearing based on the unresolved discovery disputes and the complexity of the case.

¶10 Thereafter, on March 31, 2016, Wife served a subpoena duces tecum on InterNACHI. In this subpoena, Wife sought to discover all matters concerning (1) Husband's employment and compensation; (2) the employment by InterNACHI of any person related to Husband; (3) InterNACHI's bookkeeping, accounting, and tax return or Form 990 preparation; and (4) InterNACHI's conflict-of-interest policy.

¶11 InterNACHI moved to quash this subpoena, arguing, as pertinent here, that many of the requested documents were privileged, confidential, and irrelevant to the dissolution proceeding. InterNACHI also renewed its assertion that Wife's dissolution

petition did not allege any basis, including fraud, on which to claim that InterNACHI was Husband's alter ego and therefore a marital asset.

¶12 Wife responded that the discovery requested in her subpoena was relevant to both spousal maintenance and the division of marital property. She argued that she was "clearly entitled" to discovery regarding Husband's "true income," including any distributions that he received from InterNACHI in addition to his salary and expense reimbursements, particularly given that Husband had allegedly told Wife that he had received such distributions. Wife further argued that because the court could classify InterNACHI as a marital asset if it found sufficient evidence to pierce the corporate veil, she was entitled to discovery to try to establish that InterNACHI was, in fact, Husband's alter ego. In support of this assertion, Wife alleged fourteen facts that she claimed showed that InterNACHI was Husband's alter ego.

¶13 The district court denied InterNACHI's motion to quash. In so ruling, the court rejected InterNACHI's argument that Wife had failed to plead fraud, concluding that such an allegation was unnecessary. In addition, the court noted that it could consider InterNACHI to be "property" for purposes of the equitable division of marital assets based on a finding that InterNACHI was Husband's alter ego. The court thus concluded "that discovery may be propounded under the 'alter ego' theory, subject to a protective order." In so ruling, however, the court provided no analysis and made no findings regarding InterNACHI's scope-of-discovery objections.

¶14 InterNACHI then filed a motion pursuant to C.R.C.P. 60(a), seeking a ruling on the confidentiality and privilege claims that it had raised in its motion to quash. Wife

opposed this motion, and the district court ultimately denied it, reaffirming its prior order. Specifically, the court observed that (1) "the information and records sought by [Wife] are relevant to the issue[s] of whether InterNACHI is [Husband's] alter ego . . . and to [Husband's] true income" and (2) Wife "has made sufficient assertions that the information sought may lead to such evidence."

¶15 InterNACHI then petitioned this court for review under C.A.R. 21, and we issued a rule to show cause why the district court's discovery orders should not be vacated.

II. Original Jurisdiction and Standard of Review

¶16 Exercise of our original jurisdiction under C.A.R. 21 is within our sole discretion. Fognani v. Young, 115 P.3d 1268, 1271 (Colo. 2005). Although discovery orders are generally interlocutory in nature and thus are reviewable only on appeal, this court has exercised its original jurisdiction "to review whether a trial court abused its discretion in circumstances where a remedy on appeal would be inadequate." Gateway Logistics, Inc. v. Smay, 2013 CO 25, ¶ 11, 302 P.3d 235, 238 (quoting Weil v. Dillon Cos., 109 P.3d 127, 129 (Colo. 2005)).

¶17 Here, the district court ordered InterNACHI to produce a wide range of business records that InterNACHI claims are confidential and irrelevant to the underlying dissolution proceeding. Damage to InterNACHI from the erroneous production of such records could not be cured by appeal "because the damage would occur upon disclosure to [Wife] 'regardless of the ultimate outcome of any appeal from a final judgment.'" Id. at ¶ 12, 302 P.3d at 239 (quoting Johnson v. Trujillo, 977 P.2d 152, 154

(Colo. 1999)). We therefore conclude that the exercise of our original jurisdiction is appropriate in this case.

¶18 We review a district court's discovery orders for an abuse of discretion. Id. at ¶ 13, 302 P.3d at 239. A district court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. Id.

III. Analysis

¶19 InterNACHI contends that the district court abused its discretion in refusing to quash or modify Wife's subpoena because (1) Wife was required to, but did not, plead in her dissolution petition a claim for piercing InterNACHI's corporate veil and (2) certain of Wife's discovery requests were irrelevant to her veil-piercing claim and thus were outside the scope of discovery permitted by C.R.C.P. 26. We address these issues in turn.

A. Pleading Requirements

¶20 Dissolution of marriage in Colorado is governed by Colorado's Uniform Dissolution of Marriage Act ("the Act"), §§ 14-10-101 to -133, C.R.S. (2016). The Act establishes a no-fault system of divorce and recognizes the "irretrievable breakdown of the marriage relationship" as the sole basis for dissolving a marriage. § 14-10-102(2)(c); see also Estate of Burford v. Burford, 935 P.2d 943, 952 (Colo. 1997) (noting that the adoption of the Act instituted "no-fault" divorce, requiring only that the parties demonstrate the irretrievable breakdown of the marriage to obtain a divorce).

¶21 Proceedings under the Act are commenced by the filing of a petition. See §§ 14-10-105(3), 14-10-107(1). The petition must allege that the marriage is irretrievably broken, and it must set forth:

> (a) The residence of each party and the length of residence in this state;
>
> (b) The date and place of the marriage;
>
> (c) The date on which the parties separated;
>
> (d) The names, ages, and addresses of any living children of the marriage and whether the wife is pregnant;
>
> (e) Any arrangements as to the allocation of parental responsibilities with respect to the children of the marriage and support of the children and the maintenance of a spouse;
>
> (f) The relief sought; and
>
> (g) A written acknowledgment by the petitioner and the co-petitioner, if any, that he or she has received a copy of, has read, and understands the terms of the automatic temporary injunction required by paragraph (b) of subsection (4) of this section.

§ 14-10-107(2).

¶22 We perceive nothing in this statute—and InterNACHI cites no applicable authority—requiring that a dissolution petitioner who seeks to pierce the corporate veil of an entity related to the respondent must set forth in the petition a veil-piercing claim in accordance with applicable pleading standards. To the contrary, in arguing for such a pleading requirement, InterNACHI confuses pleading standards with standards governing discovery matters. These are different standards, however, and the issue that we confront today falls squarely in the latter category. For this reason alone, we

reject InterNACHI's call for us to impose new pleading standards on petitioners in dissolution proceedings.

¶23 In addition, requiring a petitioner in a dissolution proceeding such as this to plead in the dissolution petition the elements of a veil-piercing claim would add to the statutorily mandated elements quoted above, and we will not read into a statute language that is not there. See Boulder Cty. Bd. of Comm'rs v. HealthSouth Corp., 246 P.3d 948, 954 (Colo. 2011).

¶24 Similarly, requiring a petitioner in a dissolution proceeding to plead a veil-piercing claim in the dissolution petition would potentially require the joinder of third parties at the outset of the proceeding. Such a procedure seems inconsistent with (1) the Act's repeated focus on the parties to the marriage; (2) the required allegations of the dissolution petition, which concern only those parties, see § 14-10-107(2); and (3) the underlying purposes of the Act, which include the goal of promoting "the amicable settlement of disputes that have arisen between the parties to a marriage." § 14-10-102(2)(a) (emphasis added); see also C.R.C.P. 16.2(b) (noting that the Rule governing procedures to be employed in domestic relations matters is intended "to provide the parties with a just, timely and cost effective process").

¶25 Accordingly, we conclude that Wife was not required to plead in her dissolution petition a claim seeking to pierce InterNACHI's corporate veil.

B. Discovery Standards

¶26 Our determination that Wife was not required to plead a veil-piercing claim in her dissolution petition does not end our inquiry. As noted above, this case presents a

live discovery dispute. Accordingly, we still must determine whether the district court applied the appropriate standard in assessing InterNACHI's objection to the requested discovery. We conclude that it did not.

¶27 Discovery in a dissolution action is governed by C.R.C.P. 16.2, which sets forth special case management and disclosure requirements for all domestic relations cases. C.R.C.P. 16.2(a) provides that "[f]amily members stand in a special relationship to one another and to the court system." In the interest of reducing "the negative impact of adversarial litigation wherever possible," the Rule contemplates "management and facilitation of the case by the court, with the disclosure requirements, discovery and hearings tailored to the needs of the case." Id. Toward that end, C.R.C.P. 16.2(b) requires the court to provide "active case management from filing to resolution or hearing on all pending issues," with the intent of the Rule being "to provide the parties with a just, timely and cost effective process."[1]

¶28 C.R.C.P. 16.2(f) then sets forth the types of discovery allowable under the Rule. As pertinent here, C.R.C.P. 16.2(f)(2) allows a party to take the deposition of a non-party on oral or written examination for the purpose of obtaining or authenticating documents not accessible to the requesting party. In addition, C.R.C.P. 16.2(f)(4) requires the court to grant "all reasonable requests for additional discovery for good cause as defined in C.R.C.P. 26(b)(2)(F)." And C.R.C.P. 16.2(f)(4) provides that unless

[1] C.R.C.P. 16(e)(1), in turn, provides that parties to domestic relations cases owe one another and the court "a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case." Nothing in this opinion is intended to alter those obligations.

otherwise governed by C.R.C.P. 16.2, additional discovery shall be governed by C.R.C.P. 26 through 37 and C.R.C.P. 121 section 1-12.

¶29 C.R.C.P. 26(b)(1), in turn, permits a party to obtain discovery regarding:

> any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The information sought under this Rule need not be admissible in evidence to be discoverable. Id.

¶30 This is not to say, however, that merely alleging a basis for discovery entitles a party to any potentially relevant document. Rather, as we observed in DCP Midstream, ¶ 34, 303 P.3d at 1197, district courts must take an active role in managing discovery when, as here, a person or entity from whom discovery is sought objects to the scope of that discovery. In such a case, the district court must "determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs." Id. In making such a determination, the court should, at a minimum, consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F). Id. at ¶ 35, 303 P.3d at 1197. These factors include whether the proposed discovery is unreasonably cumulative or duplicative, whether it is outside the scope permitted by C.R.C.P. 26(b)(1), and whether, given the number of parties and their alignment with respect to

the underlying claims and defenses, the proposed discovery is reasonable. See C.R.C.P. 26(b)(2)(F).[2]

¶31 Although we have not previously addressed whether the holding of DCP Midstream extends to a scope objection raised in a dissolution proceeding, for two reasons, we conclude that it does.

¶32 First, as noted above, C.R.C.P. 16.2 imposes the same duty of active case management on courts hearing domestic relations matters that C.R.C.P. 26 imposes on district courts in other civil cases. See C.R.C.P. 16.2(b); C.R.C.P. 26(b)(1); DCP Midstream, ¶ 28, 303 P.3d at 1194; see also In re Marriage of de Koning, 2016 CO 2, ¶ 25, 364 P.3d 494, 498 ("While the trial court retains discretion to grant discovery and tailor it to the particular needs of the case, Rule 16.2 indicates a preference for limiting discovery in time and in scope in order to further the efficient resolution of domestic relations cases.") (citations omitted).

¶33 Second, C.R.C.P. 16.2(f)(4) authorizes courts in dissolution cases to allow additional discovery in accordance with the same cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F), which we construed in DCP Midstream, ¶ 28, 303 P.3d at 1194.

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[2] Although C.R.C.P. 26 was amended and restructured in 2015, those changes did not alter the substance of the provisions that formed the basis of our analysis in DCP Midstream. Accordingly, our analysis in DCP Midstream continues to apply after the 2015 amendments to C.R.C.P. 26.

¶34 Given the foregoing interrelationship between C.R.C.P. 16.2 and C.R.C.P. 26(b), we perceive no reason not to apply the reasoning of DCP Midstream in the present case.

¶35 Applying that reasoning here, we conclude that the district court should initially have granted Wife only such discovery as would reasonably have been necessary to allow her to attempt to establish the existence of the alter ego relationship that she claimed. In deciding the proper scope of such discovery, the court should have considered the factors set forth in Leonard v. McMorris, 63 P.3d 323, 330 (Colo. 2003), to guide courts in making alter ego determinations. These factors include:

> (1) whether the corporation is operated as a separate entity, (2) commingling of funds and other assets, (3) failure to maintain adequate corporate records, (4) the nature of the corporation's ownership and control, (5) absence of corporate assets and undercapitalization, (6) use of the corporation as a mere shell, (7) disregard of legal formalities, and (8) diversion of the corporation's funds or assets to noncorporate uses.

Id. (quoting Newport Steel Corp. v. Thompson, 757 F. Supp. 1152, 1157 (D. Colo. 1990)).

¶36 In not tailoring discovery in this manner, and in instead allowing Wife to discover virtually any document to which she might arguably be entitled were she ultimately able to prove her veil-piercing claim, we conclude that the district court abused its discretion.

¶37 This is not to say that Wife may not subsequently be entitled to broader discovery from InterNACHI than she is entitled to at this point, and we express no opinion on that issue. If the information that Wife receives pursuant to a properly tailored discovery request shows no apparent abuse of InterNACHI's corporate form, then the principles of active case management articulated in DCP Midstream would

likely preclude further discovery regarding a veil-piercing allegation because in that scenario, additional discovery would be of negligible "importance . . . in resolving the issue[]" of alter ego liability, C.R.C.P. 26(b)(1), and any additional discovery requests premised on such liability would be unreasonable and cumulative, see C.R.C.P. 26(b)(2)(F)(I), (IV); see also Breeden v. Breeden, 678 N.E.2d 423, 426 (Ind. Ct. App. 1997) (concluding that a second subpoena for certain of a non-party corporation's business records was properly quashed when a husband sought information to establish that his wife was an owner of the corporation but the information obtained in response to his first subpoena established that she was an independent contractor).

¶38 Conversely, if Wife discovers information tending to establish that InterNACHI was Husband's alter ego and thus seeks additional discovery from InterNACHI, then the court, applying the active case management principles described above, could consider the relationship between Husband and InterNACHI, as well as any remaining privilege and confidentiality concerns that InterNACHI may still have, in determining the proper scope of any further discovery to be ordered.

¶39 Proceeding in this fashion properly balances Wife's right to pursue her alter ego allegations against InterNACHI's privilege and confidentiality concerns and its right to be free from overbroad discovery requests, particularly given its status as a non-party in this dissolution proceeding. See Gateway Logistics, ¶¶ 15–17, 302 P.3d at 240–41 (addressing the balancing test to be applied when a party or non-party from whom discovery is sought raises confidentiality and privacy concerns).

¶40 Accordingly, we vacate that portion of the district court's order compelling the production of InterNACHI's records pertinent solely to Wife's veil-piercing allegations, and we remand for further proceedings.[3]

¶41 On remand, the court should assess the proper scope of discovery to which Wife should be entitled given the reasonable needs of this case, and it should grant Wife only such discovery as would permit her to attempt to establish, by reference to the factors set forth in Leonard, 63 P.3d at 330, that InterNACHI is Husband's alter ego. Once Wife has obtained such discovery, she may seek further discovery as the needs of the case may dictate, given the then-existing evidence supporting or refuting a veil-piercing claim.

IV. Additional Issues

¶42 In light of our foregoing determination, we need not reach any of the other issues raised by InterNACHI in its petition.

V. Conclusion

¶43 For these reasons, we make the rule absolute and return this case to the district court for further proceedings consistent with this opinion.

[3] InterNACHI does not dispute Wife's entitlement to records regarding the nature or extent of payments made by it to Husband, and those records are not at issue here.

Proposed Rule Changes

Colorado Rules of Civil Procedure
(changes marked version – see below for clean version)

Rule 120. Orders Authorizing Foreclosure Sales Under Powers in a Deed of Trust to the Public Trustee

(a) Motion for Order Authorizing Sale; Contents. Whenever an order of court is desired authorizing a foreclosure sale under a power of sale contained in an instrument a deed of trust to a public trustee, any interested person entitled to enforce the deed of trust or someone on such person's behalf may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with direct knowledge who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion accompanied by a copy of the instrument containing the power of sale, shall describe the property to be sold, and shall specify the default or other facts giving rise to the default, and may include documents relevant to the claim of a default claimed by the moving party to justify invocation of the power of sale.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder and the records of the moving party, of:

(i) the grantor of such the deed of trust;,

(ii) of the current record owner of the property to be sold;, and of

(iii) allny persons known or believed by the moving party to be personally liable upon the indebtedness for the debt secured by the deed of trust;, and

(iv) as well as the names and addresses of those persons who appear to have an acquired a record interest in such real property that is evidenced by a document recorded after, subsequent to the recording of the such deed of trust and before prior to the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust whether by deed, mortgage, judgment or any other instrument of record.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address ~~which~~ that is given in the recorded instrument evidencing such person's interest., ~~except that i~~If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, t~~T~~he clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be ~~fix a time~~ not less than 21 nor more than 35 days after the filing of the motion ~~and a place for the hearing of such motion~~. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; ~~Contents;~~ Service of Notice. The moving party shall issue a notice stating:

(1) a descri~~bing~~ption of the deed of trust~~the instrument~~ containing the power of sale, the property sought to be sold ~~thereunder~~ at foreclosure, and the ~~default or other~~ facts asserted in the motion to support the claim of a default;

(2) ~~upon which the power of sale is invoked. The notice shall also state the time and place set for the hearing and shall refer to~~ the right of any interested person to file and serve a response~~s~~ as provided in section (c), including ~~a reference to the last day for filing such responses and~~ the addresses at which such response~~s~~ must be filed and served and the deadline set by the clerk for filing a response.

(3) ~~The notice shall contain~~ the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed ~~Your request may be made as a part of your response or any paper you file~~ with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) ~~The notice shall contain~~ the mailing ~~return~~ address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of the person authorized to modify the evidence of debt. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The ~~Such~~ notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, ~~date set for the hearing,~~ by:

(A~~1~~) mailing a true copy ~~thereof~~ of the notice to each person named in the motion (other than any person~~s~~ for whom no address is stated) at that~~the~~ person's address or addresses stated in the motion;

(B~~2~~) ~~and by~~ filing a copy with the clerk ~~and by delivering a second copy to the clerk~~ for posting by the clerk in the courthouse in which the motion is pending; and

(C~~3~~) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of ~~Such~~ mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, ~~posting~~ shall be ~~evidenced by~~ set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; ~~Contents;~~ Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right ~~entitlement~~ to an order authorizing sale may file and serve a response to the motion., ~~verified by the oath of such person, setting forth~~ ~~t~~The response must describe the facts the respondent relies ~~up~~on in objecting to the issuance of an order authorizing sale, and may include ~~which he relies and attaching~~ copies of ~~all~~ documents which support ~~his~~ the respondent's position. The response shall be filed and served not ~~less~~ later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. ~~7 days prior to the date set for the hearing, said interval including intermediate Saturdays, Sundays, and legal holidays, C.R.C.P. 6(a) notwithstanding, unless the last day of the period so computed is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next succeeding day which is not a Saturday, Sunday or a legal holiday.~~ Service of the ~~such~~ response ~~up~~on the moving party shall be made in accordance with C.R.C.P. 5(b). ~~C.R.C.P. 6(e) shall not apply to computation of time periods under this section (c).~~

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior the new hearing date.

(d) ~~Hearing;~~ Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. ~~At the time and place set for the hearing or to which the hearing may have been continued,~~ T~~t~~he court shall examine the motion and ~~the responses, if~~ any responses.

(1) If the matter is set for hearing, t~~T~~he scope of inquiry at the ~~such~~ hearing shall not extend beyond

(A) the existence of a default ~~or other circumstances~~ authorizing exercise of a power of sale~~,~~ under the terms of the ~~instrument~~ deed of trust described in the motion;~~,~~

(B) consideration by the court of the requirements of~~exercise of a power of sale contained therein, and such other issues required by~~ the Service~~members~~ ~~Member~~ Civil Relief Act ~~(SCRA)~~, 50 U.S.C. A.P.P. § 521~~520~~, as amended~~;~~.

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a ~~such~~ default justifying the sale ~~or other circumstance~~ has occurred, ~~and~~ whether an order authorizing sale is otherwise proper under the Servicemembers ~~said Service Member~~ Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court ~~shall summarily~~ grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4)~~Neither the granting nor the denial of a motion~~ An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of ~~any such~~ a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

~~(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the court shall dispense with the hearing and forthwith enter an order authorizing sale.~~

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1~~i~~) as to which the obligor is a natural person, and

(2~~ii~~) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property ~~thereof~~ is located. Any proceeding under this Rule ~~which~~ that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of ~~such~~ sale to be made to the court.~~,~~ ~~and i~~If it appears ~~there~~from the return that ~~such~~ the sale was conducted in conformity with the order authorizing the sale, the court shall ~~thereupon~~ enter an order approving the sale. This order shall not have preclusive effect on the parties in any action for a deficiency judgment or in a civil action challenging the right of the moving party to foreclosure or seeking to set aside the foreclosure sale.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the~~such~~ motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

~~COMMITTEE~~ COMMENTS

1989

[1] The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a special committee made up of practitioners and judges having expertise in that area of practice, with both creditor and debtor interests represented.

[2] The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

[3] There was considerable debate concerning whether the Federal "Fair Debt Collection Practices Act" is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal "Fair Debt Collection Practices Act" be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

Proposed Rule Changes

Colorado Rules of Civil Procedure
(clean version)

Rule 120. Orders Authorizing Foreclosure Sale Under Power in a Deed of Trust to the Public Trustee

(a) Motion for Order Authorizing Sale. When an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, any person entitled to enforce the deed of trust may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with direct knowledge who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust; and

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Service of Notice. The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response.

(3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of the person authorized to modify the evidence of debt. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b).

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior the new hearing date.

(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

(B) consideration by the court of the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. A.P.P. § 521, as amended;

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1) as to which the obligor is a natural person, and

(2) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property is located. Any proceeding under this Rule that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order shall not have preclusive effect on the parties in any action for a deficiency judgment or in a civil action challenging the right of the moving party to foreclosure or seeking to set aside the foreclosure sale.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

COMMENTS

1989

[1] The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a

special committee made up of practitioners and judges having expertise in that area of practice, with both creditor and debtor interests represented.

[2] The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

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MONTGOMERY LITTLE
& SORAN, PC
Attorneys at Law

DAVID C. LITTLE, ESQ.
303.773.8100
dlittle@montgomerylittle.com

January 12, 2017

VIA EMAIL: michael.berger@judicial.state.co.us

Judge Michael H. Berger
Colorado Court of Appeals
2 East 14th Ave., Third Floor
Denver, CO 80203

RE: Certification of Records Forms

Dear Judge Berger:

Please find enclosed several proposed forms that might be used in the implementation of the certification of records as addressed in Colorado evidence Rules 902(11) and 902(12). The forms pertain to the county court and are suggested as forms to be used in both the county courts and the district courts in Colorado. The enclosed documents consist of certification of records under the appropriate evidence rules (Form 10), the disclosure of the records to be offered through the certification process (Form 11), and the instructions for both Form 10 and Form 11 that hopefully will facilitate the use of both of the forms in the trial process.

Damon and I suggest that these be distributed to the folks who will attend the rules committee meeting on January 27, 2017. I hope we are on the right track with these.

Thank you for all you do.

Yours truly,

David C. Little

DCL/kd
Enclosures

FORM 11. DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS PURSUANT TO C.R.E. 902(11) AND 902(12)

COUNTY COURT, _____ COUNTY, COLORADO Address: _____ Plaintiff(s): v. Defendant(s): _____ Attorney or Party Without Attorney (Name and Address): Telephone Number: E-Mail: FAX Number: Atty. Reg. #:	☐ **COURT USE ONLY** ☐ Case No. Div.
[NAME OF PARTY] DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS	

[Name of Party] Hereby submits this Disclosure of Records to be Offered Through A Certification of Records.

[Name of Party] provides notice to all adverse parties of the intent to offer the following records through a Certification of Records Pursuant to C.R.E. 902(11) and 902(12):

[List all records to be offered through a certification of records. If you intend to offer all records through a certification, you may state "all records." Use additional Pages if necessary]

_____

_____

_____

_____

_____

_____

These records with the accompanying certification (*check applicable line*):

_____ Have already been provided to all adverse parties.

_____ Are being provided to all adverse parties with this Disclosure.

_____ Have been provided to all adverse parties in part, with the remainder being provided with this Disclosure

_____ Are available for inspection and copying on reasonable notice at this location:

_____

Date: _____ _____

(*Signature of Party or Attorney*)

CERTIFICATE OF SERVICE

I certify that on _____ (*date*) a copy of this **DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS** was served on the following parties (*list all parties served by name and address, use extra pages if necessary*):

_____ _____

_____ _____

_____ _____

_____

(*Signature of Party or Attorney*)

Form 10. CERTIFICATION OF RECORDS UNDER C.R.E. 902(11) AND 902(12)

Name of Organization or Business: _____

Address: _____

_____

City/State/Zip Code: _____

Telephone Number: _____

Subject Matter of the Records: _____

Description or Bates Number Range of the Attached Records: _____

Number of Pages: _____

Date Range of the Records: _____

I am the custodian of the attached records, or I am an employee familiar with the manner and process in which these records are created and maintained by virtue of my duties and responsibilities. I swear or affirm that to the best of my knowledge and belief that the attached records:

1) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; 2) Were kept in the course of the regularly conducted activity; 3) Were made by the regularly conducted activity as a regular practice.

[Remainder of page intentionally left blank - signature on next page]

Date: _____ Signature: _____

Print Name: _____

Job Title or Position: _____

Subscribed and affirmed or sworn before me on this _____ day of_____,

20___, in the County of _____, State of _____.

Name: _____ Signature: _____

Witness my hand and official seal.

My commission expires_____.

_____

Notary Public

INSTRUCTIONS FOR FORMS 10 AND 11

Records of a regularly conducted activity, often business records, may be admissible by affidavit if Colorado Rules of Evidence 902(11) or 902(12) are followed. Forms 10 and 11 provide a means to comply with the requirements of C.R.E. 902(11) and 902(12) to allow the admission of the records of a regularly conducted activity (otherwise known as business records). These forms are not the exclusive means of complying with the rules and parties may use other forms of certification and written notice, so long as they comply with the requirements of the rules.

Form 10

Form 10 should be completed by the person in charge of the records at the business or organization, or by another person who is familiar with how the records are kept. It must be notarized. If the business or organization does not have a notary, it may be necessary to find a notary who can notarize the signature on the affidavit, such as a notary willing to go to the business or organization.

Form 10 may be provided to the business or organization at the time records are requested, in person, by letter, or by subpoena. The form may then be completed at the time the records are provided. However, completion of the form is voluntary and the business or organization may refuse.

If a party desires a business or organization to complete Form 10 after the documents have been provided, it may be necessary to give the business a copy of the documents, so it can verify exactly what was earlier provided.

Form 10 calls for a description of the documents being certified. This description may be brief, such as: "medical records;" "architects notes and blue prints;" or "repair estimates." A Bates number range may be used as a description, so long as it allows the attached documents to be identified.

The subject matter of the documents is the person, place, or thing that the documents are about. This would be the patient the "medical records" are for; the address the "architect notes" apply to; or the car the "repair estimate" applies to.

The number of pages should be included to assist in identifying what records are certified by the affidavit.

Form 10 calls for a date range for the documents. This is to assist in determining what specific documents have been certified. If the documents are undated, and the date range cannot be ascertained, then this may be left blank.

The completed Form 10 must accompany the documents when they are offered at trial or a hearing.

Form 11

C.R.E. 902(11) and 902(12) require advance notice if documents will be offered into evidence through a certification of the records. Form 11 provides a means to provide this notice.

Form 11 should list each record that may be offered through a certification, unless all records may be offered in this manner, in which case Form 11 may state "all records." By way of example, the records may be listed by name or description, Bate's number, or trial exhibit number.

Both the records to be offered and the certifications must be provided to all adverse parties, or at least made available for inspection and copying. If the records or certifications have not already been provided, they should be attached to Form 11 or be made available for inspection and copying. The serving party need only attach those records and certifications that have not already been provided.

Form 11 must be served on all adverse parties before of the use of the records at a trial or hearing. For the sake of simplicity, it may be desirable to serve all parties, and not just all adverse parties. The service must be sufficiently in advance of the trial or hearing that the adverse parties may prepare to address the documents.

What constitutes sufficient advance notice is decided on a case-by-case basis. But Form 11 should be served sufficiently in advance of the trial or hearing that the adverse parties have an opportunity to raise any concerns with the court and to subpoena witnesses to testify about the documents if they so desire.

REPORT OF THE SUBCOMMITTEE ON C.R.C.P 121, § 1-15

From: Judge Jerry Jones

To: Civil Rules Committee

The subcommittee met on January 11, 2017, to consider several possible recommendations for amending section 1-15 of C.R.C.P. 121, entitled "Determination of Motions." The members of the subcommittee are Judge Jerry Jones, Judge John Webb, Judge Eric Elliff, Judge Adam Espinosa, Judge Sabino Romano, Judge Chris Zenisek, Dave DeMuro, Lisa Hamilton-Fieldman, Brad Levine, and Brent Owen.

The subcommittee recommends that the Civil Rules Committee recommend to the Colorado Supreme Court that it amend section 1-15 in four ways.

First, the subcommittee recommends that the first sentence of part (3) of section 1-15 be amended by substituting "written" for "C.R.C.P. 56." Thus, the sentence would read as follows: "If the moving party fails to incorporate legal authority into a written motion, the court may deem the motion abandoned and may enter an order denying the motion."

This recommendation was prompted by an attorney's e-mail message (attached hereto) to Dick Laugesen pointing out that last year's amendments to the rule may have inadvertently limited the court's authority to deem motions abandoned to motions filed under C.R.C.P. 56. The subcommittee agrees that the limitation was inadvertent, and perceives no reason for such a limitation.

Second, the subcommittee recommends that the second sentence of part (3) of section 1-15 be amended to add a clause limiting its application to motions not seeking to resolve a claim or defense. Specifically, the committee recommends that the sentence be amended to read as follows: "Other than motions seeking to

resolve a claim or defense under C.R.C.P. 12 or 56, failure of a responding party to file a responsive brief may be considered a confession of the motion."

The proposed amendment would conform the language of the rule to case law. *See Hemmann Management Servs. v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo. App. 2007) (rule does not apply to a motion under C.R.C.P. 12(b)(5) for failure to state a claim); *Quiroz v. Goff*, 47 P.3d 486, 488 (Colo. App. 2002) (rule does not apply to a motion under C.R.C.P. 12(c) for judgment on the pleadings); *Seal v. Hart*, 755 P.2d 462, 465 (Colo. App. 1988) (rule does not apply to a motion for summary judgment under C.R.C.P. 56).

The proposed amendment would not expressly comport with *Artes-Roy v. Lyman*, 833 P.2d 62, 63 (Colo. App. 1992), in which a division of the court of appeals held that the rule does not apply to a motion for attorney fees against a pro se party under section 13-17-102, at least in so far as subsection (6) of that statute requires a showing that the pro se party "clearly knew or reasonably should have known" that the action or defense was substantially frivolous, groundless, or vexatious. That case is an outlier, and because it is, the subcommittee sees little benefit in attempting to account for it in the language of section 1-15.

Third, the subcommittee recommends amending part (8) of section 1-15 to require an attempt to confer by and with a self-represented party before filing a motion and to require a description of the nature of any efforts to confer. Thus, the first sentence of part (8) would read as follows: "Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel and any moving self-represented party shall confer with opposing counsel and any opposing self-represented parties before filing a motion." The last sentence would read as follows: "If no

conference has occurred, the reason why, including all efforts to confer, shall be stated."

The first proposed amendment reflects the view that requiring conferral by and with self-represented parties may result in a more efficient resolution of the motion. The second proposed amendment would expressly require the moving party to provide more information concerning whether the moving party made a good faith effort to confer, thus enabling the judge to more easily determine whether the moving party complied with the rule.

Fourth, the subcommittee recommends deleting the word limits in part (1)(a) of section 1-15 and cross-referencing the formatting restrictions of C.R.C.P. 10(d). As amended, the second sentence of part (1)(a) would say: "Unless the court orders otherwise, motions and responsive briefs not under C.R.C.P. 12(b)(1) or (2), or 56 are limited to 15 pages, not including the case caption, signature block, certificate of service and attachments." The third sentence would say: "Unless the court orders otherwise, motions and responsive briefs under C.R.C.P. 12(b)(1) or (2), or 56 are limited to 25 pages, and reply briefs to 15 pages, not including the case caption, signature block, certificate of service and attachments." The last sentence would be deleted and replaced with a new sentence saying: "All motions and briefs shall comply with C.R.C.P. 10(d)."

Though the word limits were adopted last year, it turns out that the assumption underlying those limits — that they closely track the page limits — proved inaccurate. Put simply, the word limits allow more words than the page limits would otherwise support.

Because C.R.C.P. 10(d) already addresses formatting and length of motions and briefs in detail, the subcommittee sees no need for section 1-15 to readdress those matters. The requirement to comply with C.R.C.P. 10(d) on double spacing and margins

should assure a similar limit in length without asking practitioners to take the extra step of determining word counts that are not likely to be verified by court personnel anyway.

From: Richard W. Laugesen [mailto:laugesen@indra.com]
Sent: Monday, July 11, 2016 10:58 AM
To: berger, michael
Cc: rjtlaw@montrose.net
Subject: FW: Rule Change 2016(1) (re C.R.C.P. 121 ¶ 1-15 (Motions)

SENT ON BEHALF OF RICHARD LAUGESEN, ESQ.:

Judge Berger:

I have received an inquiry from Bob Thomas of Montrose, Colorado (shown below) concerning newly-revised CRCP 121, Sec. 1-15. I thought it best that you respond and take whatever action (if any) that may be required.

Respectfully,

Richard W. Laugesen
1830 South Monroe Street
Denver, Colorado 80210
Phone: 303-300-1006
Fax: 303-300-1008
E-Mail: laugesen@indra.com

From: Bob [mailto:rjtlaw@montrose.net]
Sent: Sunday, July 10, 2016 11:48 AM
To: Laugesen@indra.com
Subject: Rule Change 2016(1) (re C.R.C.P. 121 ¶ 1-15 (Motions)

Hi Dick,

I've got a quick question/comment on the recent change to CRCP 121, and you're the only one I know on the Rules Committee. (I "know" you primarily through various consults I've had on the phone, which you've always be so gracious to give your time).

Anyway, I've been in practice since 1981. I am currently working on a response to a motion to dismiss filed under 5 subparts of CRCP 12(b) (including 12(b) (1) and (2). The motion completely fails to give a recitation of legal authority, and so I was going to cite the rule that allowed the Court to deny the motion as being deemed "abandoned." That was, however, until I double checked the recent rule change, which removed this provision excepting only as to CRCP 56 motions for summary judgment. The recent change is as follows:

3. Effect of Failure to File Legal Authority. If the moving party fails to incorporate legal authority into ~~the motion or fails to file a brief with~~ a C.R.C.P. 56 motion, the court may deem the motion abandoned and may enter an order denying the motion. Failure of a responding party to file a responsive brief may be considered a confession of the motion.

I can't grasp the logic of this change: it provides a consequence for failure to comply as to CRCP 56 motions… but no consequence as to other motions. This had to be an oversight, as the rationale for treating motions differently on this point is not apparent….. and this is particularly puzzling since the new rule gives CRCP 12(b)(1) and (b)(2) motions/responses/replies the same special treatment as CRCP 56 motions on another issue (allowing for much larger page/word maximums). Which to me shows a recognition of the equal importance and need to fully cite legal authority in both types of motions.

What I think happened is that subpart 1(a) of the prior rule had a poorly worded provision which seemed to require the legal authority to be incorporated in the motion, excepting only Rule 56 (where separate briefs were contemplated)…. So the Committee made the following change on that provision (to eliminate the separate brief requirement) for CRCP 56 motions:

> (a) …… any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion, which shall not be filed with a separate brief. ~~except for a motion pursuant to C.R.C.P. 56.~~

So perhaps the change I'm complaining about somehow got tangled up with this effort to remove the separate treatment that only CRCP 56 motions required a separate brief.

Anyway, the following is what I think would have been an appropriate change to the pre 2016 amendment version of subpart 3:

3. Effect of Failure to File Legal Authority. If the moving party fails to incorporate legal authority into the motion ~~or fails to file a brief with a C.R.C.P. 56 motion~~, the court may deem the motion abandoned and may enter an order denying the motion. Failure of a responding party to file a responsive brief may be considered a confession of the motion.

The change to the current version of subpart 3 would be simple:

3. Effect of Failure to File Legal Authority. If the moving party fails to incorporate legal authority into ~~a C.R.C.P. 56~~ the motion, the court may deem the motion abandoned and may enter an order denying the motion. Failure of a responding party to file a responsive brief may be considered a confession of the motion.

You can compare this to the actual 2016 amendment above and determine if this makes more sense.

Anyway, I would appreciate it if you could address this at your Committee the next time you meet. Or maybe there was a specific reason to draft is as it now stands?

Kind Regards,
Bob Thomas, Attorney
Cashen, Cheney & Thomas
400 S. 3rd St.; Montrose, CO 81401
Telephone: 970.249.6611
Email: rjtlaw@montrose.net

RULE 365 MEMORANDUM

FROM: Brian T. Campbell, Judge
TO: County Court Civil Rules Committee
DATE: September 29, 2016

I am writing this memorandum in support of a movement to review and, if appropriate revise, the language of Rule 365 CRCCP. I am scheduled to be out of town at an American Judges Association conference on the date of an initial meeting scheduled for September 29, 2016. As I believe is customary for judges, I will not take any position on the existing language or proposed language and thus limit my comments to how the present language affects me and perhaps other judges. Those of you who know me know that I have been a judge for 36 years. What you may not know is that I was the presiding judge that established the Denver County Court Restraining Order Court in 1992 as a full-time division and have done four "tours of duty" in that court, including the current year. I was also assigned to the civil division in the mid-1980's when, I believe, Rule 365 was promulgated.

HISTORY: Since I was such a new judge in 1985 I was not privy to the establishment of Rule 365 and I have no recollection of that process. What I do recall, vividly, is granting Rule 365 restraining orders and presiding over contempt proceedings when there was a violation of those orders. At that time, Rule 365 was used almost exclusively to deal with what would become, in the 1990's, domestic violence or domestic abuse cases. In fact, a large part of the impetus to develop an effective means of handling domestic abuse cases arises out of the fact that, as noted above, if there was a violation of a restraining order the petitioner had to pursue a contempt of court citation which meant either hiring an attorney or face the likelihood of not being able to establish the contempt beyond a reasonable doubt. As the result of this reality and, with the growing recognition of the impact of domestic abuse on society, the Colorado legislature made sweeping changes to the restraining order process in the early 1990's and has continued to refine those changes the past 22 years.

PRESENT DAY ISSUES: There is rarely, if ever, total agreement among judges and application of Rule 365 is no exception. There is a school of thought that the very language of Rule 365 limits it to situations where the Petitioner is "attacked, beaten, molested, threatened the life, or threatened to do serious bodily injury" and absent one of these situations a judge is exceeding his or her jurisdiction if a protection order is granted. There are, however, judges who will issue Rule 365 protection orders when stalking or harassment is involved, depending on how serious the stalking or harassment is. This is the main issue which I feel needs to be rectified. As alluded to above, the problem arises out of the fact that the statute under which Rule 365 protection orders are generated today was not originally designed with Rule 365 in mind—it was

designed more to cover the newly developing domestic violence situations. This problem is exacerbated by the fact that C.R.S. §§ 13-14-101, et seq., which provides the format for all protection orders has been modified many times the past 22 years but Rule 365 was last modified in 1994 and, among other inadequacies, references a statute that is no longer applicable. I believe the time has come for major revisions.

At this juncture I will defer to the other individuals seeking to update Rule 365 on the appropriate language to be used but I will confirm that, in my experience, there is a sizeable segment of society who are not involved in domestic or family violence but they still deserve protection when stalking or harassing behavior is displayed. By the same token, care must be taken to avoid inundating the county court with situations where the petitioner is visibly upset but the heavy sanction of a protection order is not justified. One of the biggest developments the last 10 years has been the application for a protection order based more on economic considerations than real threats. People are now seeking protection orders alleging that the respondent is threatening to tell social services, file false police reports, inform petitioner's employer of bad conduct, post things on the internet and such. While any and all of these might cause emotional stress a protection order is inappropriate. When faced with this situation I deliver my "First Amendment Speech" and point out that they can bring suit for libel, slander, defamation, tortious interference with a contract but there is no protection order. I consider the most egregious cases to be the ones where landlords or tenants have come in seeking protection orders against the other when the relief they seek would best be addressed by a landlord-tenant adjudication. Almost as bad are the cases where roommates, having met through Craig's list, find out that the other person (with whom they spoke for 15 minutes) is vastly different than they thought and thus they seek a protection order. Recently one of the county court judges in Mesa County related that a potential petitioner had inquired about obtaining an order to restrain a veterinarian from euthanizing a dog and a cat. This may be one of those frequent situations where a law enforcement officer indicated that there was nothing s/he could do and that the citizen should obtain a protection order. Fortunately, the potential petitioner did not return the next day.

At this junction I will close with the pledge to assist the committee, in any way possible, to modernize Rule 365.

C.R.C.P. Rule 365

Rule 365. INJUNCTIONS, RESTRAINING ORDERS, AND ~~ORDERS FOR EMERGENCY~~ PROTECTION ORDERS

(a) ~~(a) No injunction~~**Civil Protection Orders.** No civil protection order, restraining order ~~or order to prevent domestic abuse or for emergency protection under sections 14-4-101 et seq. C.R.S.,~~, or injunction shall be issued by the court except as provided in ~~section (b) hereof or in accordance with sections 14-4-101 et seq., C.R.S.~~ this Rule 365 and Title 13, Article 14, C.R.S. This subsection shall apply to all proceedings brought under this Rule 365 and Title 13, Article 14, C.R.S.

(b) ~~**(b) Assault and Threats Against the Person – Restraining Order.**~~Repealed.

~~(1) Upon the filing of a complaint, duly verified, alleging that the defendant has attacked, beaten, molested, or threated the life of the plaintiff, or threatened to do serious bodily harm to the plaintiff, the court, after hearing the evidence and being fully satisfied therein that sufficient cause exists, may issue a temporary restraining order and a citation directed to the defendants, commanding the defendant to appear before the court at a specific time and date, to show cause, if any , why the temporary restraining order should not be made permanent.~~

~~(2) A copy of the complaint together with a copy of the temporary restraining order and a copy of the citation shall be served upon the defendant in accordance with the rules for service of process as provided in Rule 304, and the citation shall inform the defendant that should the defendant fail to appear in court in accordance with the terms of the citation, the temporary restraining order shall be made permanent , and the bench warrant may issue for the arrest of the defendant.~~

~~(3) On the return date of the citation, or on the day to which the hearing has been continued by the court, the court shall examine the record and the evidence, and if upon such record and evidence the court shall be of the opinion that the defendant has attacked, beaten, molested, or threatened the life of the plaintiff or threatened to do serious bodily harm to the plaintiff, and that unless restrained and enjoined will continue to attack, beat, molest, or threaten the life of the plaintiff, or threaten to do serious bodily harm to the plaintiff, the court shall order the restraining order to be made permanent and the order shall inform the defendant that a violation of the restraining order will constitute contempt of court and submit the defendant to such punishment as may be provided by law. Upon the consent of all parties, the court may direct that the order be a mutual, permanent restraining order.~~

(c) ~~**(c)**~~ **Restrictive Covenants on Residential Real Property.**

(1) Upon the filing of ~~a complaint,~~ duly verified~~,~~ complaint alleging that the defendant has violated a restrictive covenant on residential real property, the court shall issue a summons, which shall include notice to the defendant that it will hear the plaintiff's request for a preliminary injunction on the appearance date. A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if:

(a) it clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or the party's attorney can be heard in opposition; and

(b) the plaintiff or the plaintiff's attorney certifies to the court in writing or on the record the efforts, if any , which have been made to give notice and the reasons supporting a claim that notice should not be required. The restraining order shall be served upon the defendant, together with the summons and complaint, and shall be effective until the appearance date.

(2) On the appearance date, the court shall examine the record and the evidence and, if upon such record and evidence the court shall be of the opinion that the defendant has violated the restrictive covenant, the court shall issue a preliminary injunction which shall remain in effect until the trial of the action. If merely restraining the doing of an act or acts will not effectuate the relief to which the plaintiff is entitled, the injunction may be made mandatory. The court may, upon agreement of the parties, order that the trial of the action be advanced and consolidated with the preliminary injunction hearing.

(3) Any restraining order or injunction issued under this section (c) shall inform the defendant that a violation thereof will constitute contempt of court and subject the defendant to such punishment as may be provided by law.

Legend:	
Insertion	
~~Deletion~~	
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Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	10
Deletions	12
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	22